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7 REARDEN LLC, et al.,
8 Plaintiffs,
9 v.
10 TWDC ENTERPRISES 18 CORP., et al.,
11 Defendants.

Case No. [22-cv-02464-JST](#)

**ORDER GRANTING-IN-PART AND
DENYING-IN-PART MOTION TO
DISMISS THIRD AMENDED
COMPLAINT**

Re: ECF No. 68

12
13 Before the Court is Defendants TWDC Enterprises 18 Corp. f/k/a The Walt Disney
14 Company, Disney Content Services Co., Inc. d/b/a Disney Pictures Productions, LLC; Walt
15 Disney Pictures; Marvel Studios, LLC; MVL Film Finance LLC; Lucasfilm Ltd. LLC; and Disney
16 Studio Production Services Co., LLC's (collectively, "Disney") motion to dismiss Plaintiffs
17 Rearden LLC and Rearden MOVA LLC's (collectively, "Rearden") Third Amended Complaint.
18 ECF No. 68. The Court will grant the motion in part and deny it in part.

19 **I. BACKGROUND**

20 The factual and procedural background of this case is summarized in greater detail in this
21 Court's prior order. ECF No. 54 at 1–3. This case is the latest in a longstanding controversy
22 regarding ownership and use of the MOVA Contour Reality Capture program ("MOVA"), which
23 is used to capture high-resolution 3D models of a performer's face and facial movements, in order
24 to create facial animations for use in the production of movies. ECF No. 64 ("TAC") ¶¶ 28, 36.
25 This Court initially adjudicated a dispute between Plaintiff Rearden LLC and Shenzhen
26 Haitiecheng Science and Technology Company ("SHST") concerning the ownership of equipment
27 and intellectual property associated with MOVA ("Ownership Litigation"). *Shenzhen
28 Haitiecheng Sci. and Tech. Co., LTD v. Rearden LLC ("SHST")*, No. 15-cv-00797-JST, 2017 WL

1 3446585, at *1 (N.D. Cal. Aug. 11, 2017), *aff'd*, 823 F. App'x 455 (9th Cir. 2020). SHST is a
2 Chinese entity associated with Digital Domain 3.0, Inc. ("DD3"), a visual effects company whose
3 alleged conduct lies at the heart of the case at hand. In the Ownership Litigation, the Court issued
4 a preliminary injunction prohibiting the sale, use, movement, concealment, transfer, or disposal of
5 MOVA Assets by SHST or Virtual Global Holdings Limited ("VGH") – an entity related to DD3
6 and SHST. *See Virtue Glob. Holdings Ltd. v. Rearden LLC*, No. 15-cv-00797-JST, 2016 WL
7 9045855, at *2, *10 (N.D. Cal. June 17, 2016). After a bench trial, the Court dissolved the
8 injunction and ruled that "Rearden, not . . . DD3, owns and at all relevant times has owned the
9 MOVA Assets." *SHST*, 2017 WL 3446585, at *9. The Court further ordered the return of the
10 assets to Rearden, which included "MOVA Software, Source code, and Output files." Order
11 Regarding the Return of MOVA Assets 1, *SHST*, No. 15-cv-00797-JST (N.D. Cal. Oct. 2, 2017),
12 ECF No. 449.

13 In this case, Rearden brings claims of copyright and patent infringement. First, Rearden
14 alleges that Disney contracted with DD3 for facial performance capture services and output works
15 for the films *Avengers: Infinity War* and *Avengers: Endgame*, and that following the issuance of
16 the preliminary injunction in the Ownership Litigation, DD3 performed these services using
17 MOVA, including animating the CG characters Thanos, Ebony Maw, and the Hulk. *See* TAC
18 ¶¶ 69–85. It alleges that Disney is accordingly liable for vicarious and contributory copyright
19 infringement. *Id.* Second, Rearden alleges that Disney's MEDUSA and ANYMA facial capture
20 systems infringe upon four of Rearden's MOVA-related patents: U.S. Patent Nos. 10,825,226
21 ("226 Patent"), 11,004,248 ("248 Patent"), 11,024,072 ("072 Patent"), and 11,030,790 ("790
22 Patent") (collectively, the "Asserted Patents"). *See id.* ¶¶ 86–197.

23 Previously, the Court granted Disney's motion to dismiss Rearden's Second Amended
24 Complaint ("SAC"). ECF No. 54. In that order, the Court found that the SAC failed to
25 adequately plead a plausible claim for copyright infringement because "[s]tripped of its conclusory
26 allegations, the [SAC] fails to allege that DD3 performed facial capture shoots using the MOVA
27 system." *Id.* at 7. The Court also dismissed the patent infringement claims, finding that the
28 Asserted Patents were directed to patent-ineligible abstract ideas under 35 U.S.C. § 101. *See id.* at

1 7–15. The Court granted Rearden leave to amend the SAC to cure the deficiencies identified in
2 that order, *see id.* at 16, and Rearden filed its TAC on May 24, 2023. ECF No. 64. Disney now
3 moves to dismiss Rearden’s TAC on the same grounds as asserted in its prior motion. ECF No. 68
4 (“Mot.”).

5 **II. LEGAL STANDARD**

6 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a
7 complaint must contain “a short and plain statement of the claim showing that the pleader is
8 entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal “is appropriate only where the complaint
9 lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
10 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). “[A] complaint
11 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
12 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*,
13 550 U.S. 544, 570 (2007)). Factual allegations need not be detailed, but the facts must be “enough
14 to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

15 “A claim has facial plausibility when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
17 *Ashcroft*, 556 U.S. at 678. While this standard is not “akin to a ‘probability requirement’ . . . it
18 asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (*quoting Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a
19 defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to
20 relief.’” *Id.* (*quoting Twombly*, 550 U.S. at 557).

21 In determining whether a plaintiff has met the plausibility requirement, a court must
22 “accept all factual allegations in the complaint as true and construe the pleadings in the light most
23 favorable” to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). In so doing, “a
24 court may not look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in
25 opposition to a defendant’s motion to dismiss.” *Schneider v. California Dep’t of Corr.*, 151 F.3d
26 1194, 1197 n.1 (9th Cir. 1998) (emphasis omitted). However, the Court “may . . . consider
27 unattached evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the
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1 document; (2) the document is central to the plaintiff's claim; and (3) no party questions the
2 authenticity of the document." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir.
3 2011) (quoting *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). Finally, a plaintiff may
4 "plead[] facts alleged upon information and belief where the facts are peculiarly within the
5 possession and control of the defendant or where the belief is based on factual information that
6 makes the inference of culpability plausible." *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir.
7 2017) (quoting *Arista Records, LLC v. Doe 3*, 603 F.3d 110, 120 (2d Cir. 2010)).

8 III. DISCUSSION

9 A. Copyright Infringement

10 The Court begins with Rearden's claim for copyright infringement. The Court previously
11 found that the SAC failed to plausibly allege "that DD3 used the MOVA software to create output
12 files," as "stripped of its conclusory allegations, the [SAC] fails to allege that DD3 performed
13 facial capture shoots using the MOVA system." ECF No. 54 at 6–7. Because direct copyright
14 infringement by DD3 is a necessary element for Rearden's secondary copyright infringement
15 claim against Disney, *see, e.g., VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019),
16 the Court found this deficiency fatal and dismissed Rearden's secondary infringement claim on
17 that ground. *See* ECF No. 54 at 7. The question now before the Court is whether the amendments
18 reflected in Rearden's TAC cure that deficiency. The Court finds they do not.

19 Rearden's amendments to the TAC relate to two new pieces of evidence obtained from
20 DD3: first, Rearden alleges that it has identified a Maya¹ file returned by DD3 which contained a
21 capture of Mark Ruffalo, the actor who played the Hulk in *Avengers: Infinity War* and *Avengers:*
22 *Endgame* (the "Ruffalo Maya File"). Rearden alleges that the Ruffalo Maya File "contain[s]
23 substantial amounts of copied Mova source code covered by Rearden's copyright in the Mova

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26 ¹ "Maya is a widely used computer graphics program developed and sold by Autodesk. A .ma
27 file, or Maya animation file, is a plain text project file that contains art asset data, along with
28 commands and/or scripts. A .ma file is typically created, edited, and executed in connection with
the production of 3D graphics content." *Rearden LLC v. Walt Disney Co.*, No. 17-CV-04006-JST,
2023 WL 7185737, at *1 (N.D. Cal. Sept. 8, 2023) (citation and quotation omitted).

1 software.” TAC ¶ 52. Second, Rearden alleges that it has identified a screenshot of another Maya
2 file returned by DD3 for the character Ebony Maw, who appeared only in *Avengers: Infinity War*
3 and *Avengers: Endgame* (the “Ebony Maw Screenshot”). Rearden alleges that the Ebony Maw
4 Screenshot shows “source code that, on information and belief, was at minimum created by and
5 may include source code from the Mova Contour program, as it includes identical elements and
6 identical naming conventions for objects such as ‘mova_cache_md’, ‘mova_originalHeadMotion’,
7 and ‘mova_cache_publish_set.’” *Id.* ¶ 55. Based on these additional allegations, Rearden argues
8 that it has now pled a plausible case that DD3 used the MOVA software to create output files, that
9 “DD3 copied MOVA source code into its output files,” ECF No. 72 (“Opp.”) at 9 (emphasis in
10 original), and that “together with the previously pleaded facts concerning Thanos files with the
11 ‘mova’ name in them, . . . it is not just plausible but probable that MOVA was broadly used in the
12 creation of *Infinity War* and *Endgame*.” *Id.* at 10.

13 These amendments are insufficient to cure the deficiencies in Rearden’s copyright claim.
14 Starting with the Ruffalo Maya File, the Court takes as true Rearden’s well-pled allegation that the
15 file contains “substantial amounts of copied Mova source code covered by Rearden’s copyright in
16 the Mova software.” TAC ¶ 52; *Knivele*, 393 F.3d at 1072. However, the Court disregards as
17 legally insufficient Reardens’ subsequent allegation that “[o]n information and belief, based on the
18 date of creation of the Ruffalo Maya File and other indications of its purpose, the Ruffalo Maya
19 File was used to animate The Hulk in at least one of *Avengers: Infinity War* and *Avengers:*
20 *Endgame*.” TAC ¶ 53. While a plaintiff is entitled to plead facts alleged upon information and
21 belief “where the facts are peculiarly within the possession and control of the defendant or where
22 the belief is based on factual information that makes the inference of culpability plausible.” *Soo*
23 *Park*, 851 F.3d at 928 (internal quotation omitted), neither is true of Rearden’s allegation here.
24 The Ruffalo Maya File is in Rearden’s possession and control, yet Rearden never identifies what
25 the purported “date of creation” or “other indications . . . of purpose” are.² Instead, Rearden asks

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28 ² Rearden, in its opposition, identifies for the first time a creation date of September 2016. Opp. at 5. But that date seemingly conflicts with its own later representations that the “last modified” date of the file was sometime in August or September 2016. See Opp. at 8; Mot. at 14; ECF No. 68-7. Ultimately, the Court need not resolve inconsistency, as allegations not contained in the complaint

1 the Court to speculate as to what this “date of creation” is, what the “other indications of . . .
2 purpose” are, and why these factors would support a plausible inference that the Ruffalo Maya file
3 was used in *Avengers: Infinity War* or *Avengers: Endgame*. Such a conclusory allegation, “made
4 only on information and belief and without supporting factual allegations, is a ‘naked assertion[]
5 devoid of further factual enhancement,’ and is therefore insufficient.” *Marcus v. Nationstar Mortg.*
6 *LLC*, No. 19-56288, 2022 WL 1486831, at *1 (9th Cir. May 11, 2022) (quoting *Iqbal*, 556 U.S. at
7 678); *see also DCR Workforce, Inc. v. Coupa Software, Inc.*, No. 21-16903, 2022 WL 17101148,
8 at *2 (9th Cir. Nov. 22, 2022) (dismissing conclusory allegations pled “on information and belief”
9 where plaintiff possessed actual knowledge). And without this conclusory allegation, Rearden’s
10 remaining allegations regarding the content of the Ruffalo Maya File, even if taken as true, do not
11 sufficiently support a plausible inference that DD3 operated MOVA or copied MOVA source code
12 into output files such that MOVA was “broadly used in the creation of *Infinity War* and
13 *Endgame*.” Opp. at 10.

14 The Court next turns to Rearden’s new allegations regarding the Ebony Maw Screenshot.
15 Rearden alleges that the Ebony Maw Screenshot shows a Maya file that was used to animate the
16 character Ebony Maw, who appears exclusively in *Avengers: Infinity War* and *Avengers:*
17 *Endgame*. TAC ¶ 54. According to Rearden, the Ebony Maw Screenshot shows a Maya file that
18 includes “source code that, on information and belief, was at minimum created by and may
19 include source code from the Mova Contour program, as it includes identical elements and
20 identical naming conventions for objects such as ‘mova_cache_md’, ‘mova_originalHeadMotion’,
21 and ‘mova_cache_publish_set.’” *Id.* ¶ 55. Finally, Rearden alleges that, because DD3 represented
22 the Ebony Maw Screenshot shows a Maya file created by DD3’s Masquerade software, “the
23 Masquerade software included substantial amounts of copied Mova source code such that the
24 Masquerade software constitutes either an unauthorized copy of the stolen and copyrighted Mova
25 software or an unauthorized derivative work using the stolen and copyrighted Mova software.” *Id.*
26 ¶ 57.

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28 may not be considered on a Rule 12(b)(6) motion to dismiss. *See Schneider*, 151 F.3d at 1197.

1 The Court finds Rearden's allegations relating to the Ebony Maw Screenshot insufficient
2 to support a plausible inference of culpability. Rearden alleges "on information and belief" that
3 the Ebony Maw Screenshot shows a Maya file containing MOVA source code, but that allegation
4 is contradicted by the actual screenshot, which, on its face, shows no source code at all.³ Instead,
5 it shows a Maya file opened in the AutoDesk Maya program, in which certain objects in the file
6 are named using MOVA naming conventions. Because such allegations are contradicted by
7 evidence incorporated into the TAC, the Court need not accept them as true. *See Sprewell v.*
8 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *opinion amended on denial of reh'g*,
9 275 F.3d 1187 (9th Cir. 2001). As to Rearden's remaining allegations regarding naming
10 conventions, the Court previously held that allegations that file or folder names containing the
11 word "mova" are insufficient to support a plausible inference that the files "actually contain
12 copies, or reflect the copying, of MOVA software." ECF No. 54 at 6. The same continues to be
13 true here. Allegations that a Maya file of the Ebony Maw character used the word "mova" in its
14 naming conventions, without more, is insufficient to establish a reasonable inference that the file
15 itself contained MOVA source code, or that DD3's Masquerade software copied "substantial
16 amounts" of MOVA source code.

17 Because Rearden's new allegations regarding the Ruffalo Maya File and Ebony Maw
18 Screenshot are insufficient to raise its allegations of DD3's direct copyright infringement beyond a
19 speculative level, the Court cannot draw a plausible inference of culpability as to its secondary
20 copyright infringement claims against Disney. The Court therefore grants Disney's motion to
21 dismiss as to the TAC's copyright infringement claim.

22 **B. Patent Infringement**

23 The Court next turns to Rearden's claims for patent infringement. Previously, the Court

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³ Rearden did not attach the actual Ebony Maw Screenshot to the TAC. Disney in its supporting
26 papers, attaches an exhibit that it represents as the Ebony Maw Screenshot, and asks the Court to
27 consider it as incorporated by reference. *See* Mot. at 15 n.5; ECF No. 67-6. Rearden does not
28 dispute the authenticity of the exhibit, nor contend that it is not representative of the Ebony Maw
Screenshot. Accordingly, and because the Ebony Maw screenshot is regularly referenced by and
central to Rearden's copyright claim, the Court considers it incorporated by reference for the
purposes of this motion. *See Corinthian Colleges*, 655 F.3d at 999.

1 found the Asserted Patents were invalid under the Supreme Court’s two-step patent eligibility
2 inquiry, which asks the Court to first “determine whether the claims at issue are directed to [a]
3 patent-ineligible concept[]” and if so, “to then consider the elements of each claim both
4 individually and ‘as an ordered combination’ to determine whether the additional elements
5 ‘transform the nature of the claim’ into a patent-eligible application.” *Alice Corp. Pty. v. CLS*
6 *Bank Int’l*, 573 U.S. 208, 217 (2014). At step one, the Court found that the Asserted Patents’
7 representative claims⁴ “fail to recite specific means of implementing the abstract concept of
8 markerless facial motion capture” and are therefore directed to patent-ineligible abstract ideas.
9 ECF No. 54 at 14. At step two, the Court found that “[b]ecause each claim ‘contains no restriction
10 on how the result is accomplished . . . [and] [t]he mechanism . . . is not described, although this is
11 stated to be the essential innovation[,]’ the claims fail to recite an inventive concept and are not
12 patent-eligible.” *Id.* at 15 (alterations in original) (quoting *Intell. Ventures I LLC v. Symantec*
13 *Corp.*, 838 F.3d 1307, 1316 (Fed. Cir. 2016)).

14 Rearden argues that the amendments reflected in the TAC compel a different result.
15 Specifically, Rearden’s amendments add allegations that the claim terms “correlate”/“correlated”
16 and “track”/“automatically track” in the Asserted Patents, and “correspond to similar facial
17 expressions of a performer’s face from a second facial performance” in the ’226 Patent, should be
18 construed as limited to, and requiring the use of, specific methods disclosed in the Asserted
19 Patents’ shared specification. *See* TAC ¶¶ 89–94; 120–124; 143–147; 172–176. Rearden argues
20 that these proposed constructions must be accepted on a motion to dismiss, and that “[t]aken as
21 true, these factual allegations show that the patents-in-suit are not directed to unpatentable abstract
22 ideas[.]” Opp. at 15.

23 Because a “determination of patent eligibility requires a full understanding of the basic
24 character of the claimed subject matter[,]” the Federal Circuit has stated that “it will ordinarily be
25 desirable—and often necessary—to resolve claim construction disputes prior to a § 101 [patent

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27 ⁴ The Court treats as representative claim 1 of the ’226 Patent, claim 1 of the ’248 Patent, claim 9
28 of the ’072 Patent, and claim 9 of the ’790 Patent, for the same reasons described in its prior order.
See ECF No. 54 at 9.

1 eligibility] analysis[.]” *Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d
2 1266, 1273–74 (Fed. Cir. 2012); *see also MyMail, Ltd. v. ooVoo, LLC*, 934 F.3d 1373, 1379 (Fed.
3 Cir. 2019). However, it is also the case that “claim construction is not an inviolable prerequisite to
4 a validity determination under § 101” because “[i]f claims are directed to ineligible (or eligible)
5 subject matter under all plausible constructions, then the court need not engage in claim
6 construction before resolving a Section 101 motion.” *Sanderling Mgmt. Ltd. v. Snap Inc.*, 65 F.4th
7 698, 704 (Fed. Cir. 2023) (internal quotation omitted). Therefore, “[i]n aid of determining
8 whether a particular motion requires claim construction before disposition of the motion, a district
9 court is free to require the party asking for construction to provide an actual proposed
10 construction, to demonstrate that its construction is not frivolous, and to articulate how adoption of
11 the construction would materially impact the analysis at step one (and/or at step two).” *Id.* If the
12 non-moving party succeeds in demonstrating the existence of a plausible claim construction
13 dispute, “the court must proceed by adopting the non-moving party's constructions . . . or resolve
14 the disputes to whatever extent is needed to conduct the § 101 analysis, which may well be less
15 than a full, formal claim construction.” *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882
16 F.3d 1121, 1125 (Fed. Cir. 2018) (internal citation omitted); *see also MyMail*, 934 F.3d at 1379.

17 Because Rearden has alleged proposed constructions in the TAC, the Court is entitled to
18 determine whether the proposed constructions are frivolous, and if the constructions are
19 nonfrivolous, whether their adoption would materially change the patent eligibility analysis. The
20 Court is aware of no case that has considered what a frivolous claim construction would be in the
21 context of a motion to dismiss for patent eligibility, but since claim construction is a question of
22 law for the Court to resolve, any proposed construction “is subject to Rule 11(b)(2)’s requirement
23 that all legal arguments be nonfrivolous.” *Raylon, LLC v. Complus Data Innovations, Inc.*, 700
24 F.3d 1361, 1368 (Fed. Cir. 2012). Because “[r]easonable minds can differ as to claim construction
25 positions and losing constructions can nevertheless be nonfrivolous,” a frivolous claim
26 construction position is one that is “so unreasonable that no reasonable litigant could believe it
27 would succeed[.]” *Id.* (internal quotation omitted).

1 **1. “correlate”/“correlated”**

2 Rearden proposes that the terms “correlate” and/or “correlated” in the Asserted Patents be
3 construed to:

4 require use of a pixel-wise cross-correlation algorithm for
5 determining the 3D location of points on the performer’s face by
6 correlating a plurality of 2D frames from a plurality of cameras at the
7 same time interval, as set forth in the flowchart of Figure 15 of the
8 ’226 Patent with its use described in detail at col. 11:25-17:4, together
9 with the alternate embodiments for adjusting the values within the
10 correlation algorithm described at col. 17:5-18 and the alternate
11 correlation embodiments detailed at 17:19-20:31.

12 Opp. at 15–16 (quoting TAC ¶¶ 89, 120, 143, 172). Rearden argues that this “specialized
13 meaning” of the terms “is supported throughout the patent-in-suit’s specifications.” Opp. at 16.
14 Essentially, Rearden argues that the patentee acted as its own lexicographer, by setting forth “a
15 special definition . . . that differs from the meaning it would otherwise possess.” *Philips v. AWH*
16 *Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005).

17 It is “a basic principle of claim construction . . . that ‘the words of a claim are generally
18 given their ordinary and customary meaning.’” *Source Vagabond Sys. Ltd. v. Hydrapak, Inc.*, 753
19 F.3d 1291, 1299 (Fed. Cir. 2014) (quoting *Philips*, 415 F.3d at 1312). Because the claims “do not
20 stand alone,” they “must be read in view of the specification, of which they are a part.” *Philips*,
21 415 F.3d at 1315 (internal quotation omitted). Thus, the ordinary and customary meaning of a
22 claim term is “not the meaning of the term in the abstract,” but rather “its meaning to the ordinary
23 artisan after reading the entire patent.” *Id.* at 1321; *see also Bradium Techs. LLC v. Iancu*, 923
24 F.3d 1032, 1042 (Fed. Cir. 2019) (“Claim construction seeks to ascribe to claim terms the meaning
25 a person of ordinary skill in the art at the time of invention would have given them.”); *Trustees of*
26 *Columbia Univ. in City of New York v. Symantec Corp.*, 811 F.3d 1359, 1362 (Fed. Cir. 2016)
27 (“Claim construction requires a determination as to how a person of ordinary skill in the art would
28 understand a claim term in the context of the entire patent, including the specification.” (internal
quotation omitted)). The specification “is always highly relevant to the claim construction
analysis” and usually, “it is the single best guide to the meaning of a disputed term.” *Phillips*, 415
F.3d at 1315 (internal quotation omitted). In particular, the specification “may reveal a special

1 definition given to a claim term by the patentee that differs from the meaning it would otherwise
2 possess” or “an intentional disclaimer, or disavowal, of claim scope by the inventor.” *Id.* at 1316.

3 Rearden argues that the Asserted Patents set forth a “specialized meaning” of the term
4 “correlate.” A patentee seeking to be its own lexicographer “must clearly express that intent in the
5 written description” with “sufficient clarity to put one reasonably skilled in the art on notice that
6 the inventor intended to redefine the claim term.” *Merck & Co. v. Teva Pharm. USA, Inc.*, 395
7 F.3d 1364, 1370 (Fed. Cir. 2005). This intent need not be expressed as a formal redefinition, as
8 the “specification may define terms ‘by implication’ such that the meaning may be found in or
9 ascertained by a reading of the patent documents.” *Bell Atl. Network Servs., Inc. v. Covad
Comm’ns Grp., Inc.*, 262 F.3d 1258, 1268 (Fed. Cir. 2001) (internal quotation omitted).
10 However, “[i]t is not enough for a patentee to simply disclose a single embodiment or use a word
11 in the same manner in all embodiments, the patentee must ‘clearly express an intent’ to redefine
12 the term.” *Thorner v. Sony Computer Ent. Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012);
13 *accord Bradium*, 923 F.3d at 1044. However, “when a patentee uses a claim term throughout the
14 entire patent specification, in a manner consistent with only a single meaning, he has defined that
15 term ‘by implication.’” *Bell Atl.*, 262 F.3d at 1271; *see also In re Abbott Diabetes Care Inc.*, 696
16 F.3d 1142, 1150 (Fed. Cir. 2012) (claim term may be defined by implication where patents
17 “repeatedly, consistently, and exclusively” depict embodiments using that definition).
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19 The Court finds that there is sufficient support in the specification for Rearden’s proposed
20 construction such that it is not “so unreasonable that no reasonable litigant could believe it would
21 succeed[.]” *Raylon*, 700 F.3d at 1368 (internal quotation omitted). Columns 11:27–17:4 and
22 Figure 15 of the specification disclose a specific pixel-wise cross-correlation algorithm that is
23 described as “one specific embodiment of a method for correlating two frame captures.” ’226
24 Patent at 11:47–49.⁵ The specification then goes on to disclose a broader genus of such methods,
25 which are described as variations using the algorithm disclosed in Figure 15 as a “guideline” with
26 modifications to certain variables. *Id.* at 17:5–17. Notably, all such methods are described as
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⁵ Because the Asserted Patents share a specification, the Court refers to the ’226 Patent for consistency with the parties’ briefing. *See Opp.* at 16 n.4.

1 involving pixel-wise cross-correlations, *id.* at 17:15–17, and aside from these disclosures, the
2 specification describes no other method of “correlating” data.

3 Additionally, every reference to “correlating” or “correlation” in the specification either
4 expressly references, or is consistent with only such a pixel-wise cross correlation method. For
5 example, the specification regularly describes “correlation values” which would suggest use of a
6 mathematical algorithm, and is inconsistent with the ordinary meaning of “correlation” as used in
7 common parlance. Similarly, the specification regularly refers to “correlating” frames or data
8 streams captured from cameras using a data processing system (*see, e.g.*, '226 Patent at 8:28–35)
9 or describes correlations done at various “resolutions” (*see id.* at 18:32–40), which again at least
10 suggests use of a software algorithm. In contrast, when describing processes done manually by
11 eye, the specification uses different terminology. *See id.* at 18:16–18 (“A user would be able to see
12 with the naked eye that regions 1602, 1604, and 1606 *correspond* to regions 1612, 1614, and
13 1616, respectively.” (emphasis added)). Because the specification arguably “repeatedly,
14 consistently, and exclusively” refers to a pixel-wise cross-correlation algorithm when it uses the
15 term “correlate,” it would not be unreasonable to argue that the term should be construed to
16 require the use of such an algorithm. *See Abbott*, 696 F.3d at 1149–50 (construing
17 “electrochemical sensor” as not having external wires or cables because the patents “repeatedly,
18 consistently, and exclusively depict an electrochemical sensor without external cables or wires
19 while simultaneously disparaging sensors with external cables or wires.” (internal quotation
20 omitted)). Therefore, the Court concludes that Rearden’s proposed construction is not frivolous.⁶

21 The Court next considers “how adoption of [Rearden’s proposed] construction would
22 materially impact the analysis at step one (and/or at step two).” *Sanderling*, 65 F.4th at 704. The
23 Court finds that here, adoption of Rearden’s proposed construction would render the claims
24 patent-eligible. In its prior order, the Court reasoned that the Asserted Patents’ representative
25 claims were directed to abstract ideas because “the steps of the representative claims of the patents
26 at hand lack any limitations that incorporate particular information or feature specific techniques”

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28⁶ In reaching this conclusion, the Court determines only that the construction is not frivolous, and
expresses no view at this time whether the construction is correct.

1 and “‘merely invoke generic processes’ such as communicating, tracking, and creating.” ECF
2 No. 54 at 13, 14 (quoting *McRO, Inc. v. Bandai Namco Games America, Inc.*, 837 F.3d 1299,
3 1314 (Fed. Cir. 2016)). However, if the Court were to adopt Rearden’s proposed construction, the
4 representative claims would instead incorporate particular information or feature specific
5 techniques in the form of specific pixel-wise cross-correlation algorithms, as opposed to the
6 generic concept of “correlation” in the abstract. In such a case, the representative claims would be
7 analogous to those found patent-eligible in *McRO*, where the Federal Circuit reasoned that by
8 incorporating a specific genus of rules, the representative claim “is limited to a specific process for
9 automatically animating characters using particular information and techniques and does not
10 preempt approaches that use rules of a different structure or different techniques.” *Id.* at 1316.
11 Here too, if limited to a specific genus of algorithms for pixel-wise cross-correlation, the
12 representative claims would focus on “a specific means or method that improves the relevant
13 technology” of 3D facial capture, and not the “result or effect that itself is the abstract idea” such
14 that it would preempt the entire field. *Id.* at 1314, *see also Koninklijke KPN N.V. v. Gemalto M2M*
15 *GmbH*, 942 F.3d 1143, 1150 (Fed. Cir. 2019) (holding claims were not abstract because they
16 “recit[ed] a specific implementation of the varying way that check data is generated that improves
17 the ability of prior art error detection systems to detect systematic errors”); *Ancora Techs., Inc. v.*
18 *HTC Am., Inc.*, 908 F.3d 1343, 1348 (Fed. Cir. 2018) (holding claim was not abstract because it
19 “specifically identifie[d] how [a] functionality improvement is effectuated”); *Data Engine Techs.*
20 *LLC v. Google LLC*, 906 F.3d 999, 1011 (Fed. Cir. 2018) (holding claims were not abstract
21 because they recited a “specific structure . . . that performs a specific function”).

22 Disney’s counterarguments fail to persuade. First, Disney argues that even crediting
23 Rearden’s proposed construction, the specification makes clear that the pixel-wise cross-
24 correlation algorithms it described are well-known in the art. Mot. at 24. Rearden counters that,
25 according to the specification, these algorithms were only well-known in the field of astronomy,
26 and the Asserted Patents’ application of these algorithms to the field of facial motion capture was
27 novel and inventive. Opp. at 21. This dispute is not one of patent eligibility, but rather novelty
28 and/or anticipation, and therefore cannot be resolved on a motion to dismiss. *See CardioNet, LLC*

1 v. *InfoBionic, Inc*, 955 F.3d 1358, 1373 (Fed. Cir. 2020) (“The § 101 patent-eligibility inquiry is
2 only a threshold test, and we reserve for §§ 102 and 103 purposes our comparison of the prior art
3 and the claims to determine if the claims are, in fact, an improvement over the prior art.” (citation
4 and quotation omitted)). It is well established that “applications” of patent-ineligible abstract
5 ideas to solve specific technological problems are entitled to patent protection. *See Alice*, 573
6 U.S. at 217; *Diehr*, 450 U.S. at 178 (finding patent-eligible application of “well-known”
7 mathematical equation to solve a technological problem in rubber manufacturing). That the pixel-
8 wise cross-correlation algorithms disclosed in the Asserted Patents may have been well-known
9 does not change the character of the claims for the purposes of patent eligibility. *See Parker v.*
10 *Flook*, 437 U.S. 584, 591–92 (1978) (“The novelty of the mathematical algorithm is not a
11 determining factor at all. Whether the algorithm was in fact known or unknown at the time of the
12 claimed invention, as one of the ‘basic tools of scientific and technological work,’ it is treated as
13 though it were a familiar part of the prior art.” (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67
14 (1972)).

15 Second, Disney argues that even if the claims were limited to requiring pixel-wise cross-
16 correlation algorithms, the Asserted Patents’ representative claims are still patent-ineligible
17 because mathematical formulas are abstract ideas. However, as Disney itself acknowledges, a
18 claim that employs a “well-known mathematical equation . . . in a process designed to solve a
19 technological problem” is patent-eligible. *Alice*, 573 U.S. at 223. Disney asserts that here, “there
20 is no claimed process beyond the algorithm itself[,]” ECF No. 73 (“Reply”) at 15, but that is
21 demonstrably not the case—the representative claims recite additional limitations that relate
22 specifically to techniques in facial motion capture (e.g., rendering 3D animated faces, capturing
23 2D frames through a plurality of cameras, tracking 3D images in motion). These limitations serve
24 to restrict the claims to only an application of the pixel-wise cross-correlation algorithm as a
25 method for solving a specific technological problem—rendering a 3D animated face from 2D
26 camera captures of a performer’s face. Put another way, the Asserted Patents “employ[] a well-
27 known mathematical equation, but they do not seek to pre-empt the use of that equation. Rather,
28 they seek only to foreclose from others the use of that equation in conjunction with all of the other

1 steps in their claimed process.” *Diehr*, 450 U.S. at 187; *see also Enfish, LLC v. Microsoft Corp.*,
2 822 F.3d 1327, 1339 (Fed. Cir. 2016) (distinguishing patent-ineligible claim “where general-
3 purpose computer components are added post-hoc to a fundamental economic practice or
4 mathematical equation” with patent-eligible claims “directed to a specific implementation of a
5 solution to a problem in the software arts.”).

6 Third, Disney argues that, even crediting Rearden’s proposed construction, the
7 representative claims still “fail[] to claim the only alleged improvement in the prior art described
8 in the specification,” Mot. at 18, and “do not recite specific methods of implementing markerless
9 motion capture that the specification contends is an improvement over a prior art (i.e., the use of a
10 painted random pattern.”). Reply at 15–16. The Court finds this argument unpersuasive. A
11 patent’s specification is not limited to describing only one innovation, and a patentee is entitled to
12 claim multiple innovations so disclosed through multiple patents. At best, Disney’s objections
13 raise a factual dispute as to the scope of the specification’s disclosures, which the Court need not
14 resolve on a motion to dismiss.

15 Because the Court finds that Rearden’s proposed construction of the terms
16 “correlate”/“correlated” in the Asserted Patents nonfrivolous, and that their adoption would render
17 the representative claims patent-eligible, the Court concludes that it is appropriate to defer ruling
18 on the question of patent eligibility until after claim construction. *See RideApp, Inc. v. Lyft, Inc.*,
19 No. 18-CV-07152-JST, 2019 WL 7834759, at *2 (N.D. Cal. Aug. 15, 2019). The Court need not
20 rule on Rearden’s proposed constructions of other claim terms at this juncture, and denies
21 Disney’s motion to dismiss as to the TAC’s patent infringement claims.

22 C. Leave to Amend

23 Finally, the Court considers whether Rearden should have a further opportunity to amend
24 its copyright infringement claim. Disney argues that any further amendment would be futile, in
25 light of Rearden’s failure to plead a viable claim in three previous amendments. Mot. at 32; Reply
26 at 19. Rearden argues that further amendment would not be futile, and that leave to amend should
27 be granted, because “Rearden still has not received documents in DD3’s possession from the
28 Ownership Litigation that could show additional relevant acts of direct infringement.” Opp. at 28.

1 The decision of whether to grant leave to amend is within the discretion of the district
2 court, which may deny leave to amend “due to ‘undue delay, bad faith or dilatory motive on the
3 part of the [party seeking leave to amend], repeated failure to cure deficiencies by amendments
4 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
5 amendment, [and] futility of amendment.’” *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522,
6 532 (9th Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182, (1962)). Where, as here, “the
7 plaintiff has previously been granted leave to amend and has subsequently failed to add the
8 requisite particularity to its claims, the district court’s discretion to deny leave to amend is
9 particularly broad.” *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 420 (9th Cir. 2020) (internal
10 quotation omitted).

11 The Court is not convinced at this juncture that further amendment to Rearden’s copyright
12 infringement claim would be futile. Rearden states, and Disney does not dispute,⁷ that “Rearden
13 still has not received documents in DD3’s possession from the Ownership Litigation that could
14 show additional relevant acts of direct infringement.” Opp. at 28. It also argues that “[t]he Court
15 has never previously addressed the control, knowledge, and financial benefit elements of
16 Rearden’s indirect infringement claims.” *Id.* The Court will therefore grant Rearden one final
17 chance to amend its copyright infringement claim, wherein Rearden “must be willing to make [its]
18 averments without caveat and/or with additional detail explaining the basis of [its] beliefs.” *Vespa*
19 *v. Singler-Ernster, Inc.*, No. 16-CV-03723-RS, 2016 WL 6637710, at *2 (N.D. Cal. Nov. 8, 2016).

20 **IV. CONCLUSION**

21 For the foregoing reasons, Disney’s motion to dismiss is granted without prejudice as to
22 Rearden’s claim for vicarious and contributory copyright infringement. Disney’s motion is denied
23 as to Rearden’s claims for patent infringement. Rearden may file an amended complaint within
24 twenty-one days of this order solely to cure the deficiencies identified by this order. Failure to do
25 so, or to cure the deficiencies identified in this order, shall result in dismissal with prejudice. If

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⁷ Disney does argue that Rearden has received “*many thousands of MOVA files* that contain
28 images and video of studio actors.” Reply at 9–10 (emphasis in original). But it does not contend
that DD3’s production is complete.

1 Rearden believes that it needs additional time to obtain further evidence from DD3, it may seek a
2 stipulation, or move for an extension of that deadline.

3 **IT IS SO ORDERED.**

4 Dated: March 21, 2024


5 JON S. TIGAR
6 United States District Judge

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United States District Court
Northern District of California